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Lim Guan Eng v FZ Sdn Bhd & Anor

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HIGH COURT (PENANG) — CIVIL CASE NO 23NCVC-2-01 OF 2012
NORDIN HASSAN JC
22 SEPTEMBER 2014

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Civil Procedure — Transfer of action — High Court to High Court — Chief Minister of Penang filed civil suit against defendants for defaming him on website — Whether damage to plaintiff's reputation far greater in Penang than elsewhere — Whether facts related to alleged defamation occurred mainly in Penang and involved witnesses largely from Penang — Whether High Court at Penang most suitable forum to hear case — Whether fact defendants were situated/resident in Selangor not sufficient ground to transfer action to High Court at Shah Alam

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Penang's Chief Minister cum Member of Parliament for Bagan and State Assemblyman for Air Puteh ('the plaintiff') sued the defendants in the instant action for defaming him in an article written by the second defendant on a website owned and operated by the first defendant. The article alleged the plaintiff was being investigated by the Malaysian Anti-Corruption Commission ('MACC') for corruption. Shortly after the suit was filed, the defendants applied to have it transferred to the High Court at Shah Alam pursuant to O 57 r 1 of the Rules of Court 2012 and/or para 12 of the Schedule to the Courts of Judicature Act 1964 ('the Act'). The defendant submitted that the High Court at Shah Alam was the more appropriate forum to determine the matter on the grounds the first defendant's registered address and place of business was in Petaling Jaya; it was at that address the impugned article was uploaded onto the website; the second defendant resided in Cyberjaya and also because the MACC had its headquarters in Putrajaya. The plaintiff objected to the application to transfer on the grounds the damage to the plaintiff's reputation as a result of the article was far greater in Penang than elsewhere because of the political positions he held there and because the material facts which related to the case occurred in Penang.

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Held, dismissing the defendant's application with costs of RM3,000:

(1) Although the place where the cause of action occurred could be any place where a person downloaded and read the impugned article, the damage to the plaintiff's reputation was far greater in Penang because of his position as Chief Minister of Penang, Member of Parliament for Bagan and State Assemblyman for Air Puteh. An analysis of the article also showed that all the facts stated therein occurred in Penang or were related to matters in Penang. The contents of the alleged defamatory statements were the material facts in dispute to be examined by the court. It was

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certainly not confined only to the issue of whether or not MACC had commenced a probe into the purchase of the Mercedez Benz as was contended by the defendants (see paras 18, 20–23).

(2) As the facts in the alleged defamatory statements contained matters related to Penang, the calling of witnesses from Penang, including Tan Sri Tan Geok Ping, could not be ruled out. As the facts on which the proceedings were based existed or occurred mainly in Penang, by virtue of s 23(1)(c) of the Act the High Court at Penang had jurisdiction to hear the case. It was also the suitable and appropriate forum to hear this mattter as it was the forum with which the action had the most real and substantial connection (see paras 25, 28 & 31).

(3) The fact that the first defendant was situated in Petaling Jaya and that the second defendant resided in Cyberjaya were not sufficient grounds to transfer the case to the Shah Alam High Court (see para 33).

[Bahasa Malaysia summary

Ketua Menteri Pulau Pinang merangkap Ahli Parlimen untuk kawasan Bagan dan Ahli Dewan Negeri Air Puteh ('plaintif') menyaman defendan-defendan dalam tindakan ini kerana memfitnahnya dalam artikel yang ditulis oleh defendan kedua di laman web yang dimiliki dan dijalankan oleh defendan pertama. Artikel mendakwa plaintif disiasat oleh Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') kerana perbuatan memberi rasuah. Sebaik saja tindakan difailkan, defendan-defendan memohon untuk ianya dipindahkan ke Mahkamah Tinggi Shah Alam berikutan A 57 k 1 Kaedah-Kaedah Mahkamah 2012 dan/atau perenggan 12 Jadual kepada Akta Mahkamah Kehakiman 1964 ('Akta'). Defendan berhujah bahawa Mahkamah Tinggi Shah Alam forum yang lebih wajar untuk menentukan perkara atas alasan alamat berdaftar defendan pertama dan tempat perniagaan adalah di Petaling Jaya; ia adalah di alamat tersebut artikel yang didakwa dimuat naik ke laman web; defendan kedua tinggal di Cyberjaya dan juga kerana ibu pejabat SPRAM terletak di Putrajaya. Plaintif membantah kepada permohonan untuk pemindahan atas alasan ganti rugi kepada reputasi plaintif akibat artikel tersebut adalah lebih terjejas di Pulau Pinang daripada tempat lain kerana kedudukan politik yang dipegangnya di situ dan kerana fakta material yang berkaitan kepada kes berlaku di Pulau Pinang.

Diputuskan, menolak permohonan defendan dengan kos sebanyak RM3,000:

(1) Walaupun tempat di mana kausa tindakan berlaku boleh berlaku di mana-mana tempat di mana seseorang muat turun dan membaca artikel yang didakwa tersebut, ganti rugi kepada reputasi plaintif adalah lebih terjejas di Pulau Pinang kerana kedudukannya sebagai Ketua Menteri Pulau Pinang, Ahli Parlimen Bagan dan Ahli Dewan Negeri Air Puteh.

Analisis artikel juga menunjukkan bahawa kesemua fakta yang dinyatakan di dalamnya berlaku di Pulau Pinang atau berkaitan kepada perkara di Pulau Pinang. Kandungan pernyataan fitnah yang didakwa adalah fakta material yang dipertikaikan untuk ditentukan oleh mahkamah. Ia semestinya tidak dalam lingkungan hanya kepada isu sama ada atau tidak SPRAM telah memulakan siasatan atas pembelian Mercedez Benz seperti yang dihujahkan oleh defendan-defendan (lihat perenggan 18, 20–23).

(2) Memandangkan fakta di dalam pernyataan fitnah yang didakwa mengandungi perkara berkenaan Pulau Pinang, pemanggilan saksi-saksi dari Pulau Pinang, termasuk Tan Sri Tan Geok Ping, tidak boleh diketepikan. Memandangkan fakta di mana prosiding didasarkan wujud atau kebanyakkannya berlaku di Pulau Pinang, mengikut s 23(1)(c) Akta Mahkamah Tinggi Pulau Pinang mempunyai bidang kuasa untuk mendengar kes tersebut. Ia juga forum yang sesuai dan wajar untuk mendengar perkara ini kerana ia adalah forum di mana tindakan mempunyai hubungan yang nyata dan substansial (lihat perenggan 25, 28 & 31).

(3) Fakta bahawa defendan pertama terletak di Petaling Jaya dan defendan kedua tinggal di Cyberjaya bukan alasan yang mencukupi untuk memindahkan kes ke Mahkamah Tinggi Shah Alam (lihat perenggan 33).]

Notes

For cases on High Court to High Court, see 2(4) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 9804–9811.

Cases referred to

American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor [1995] 1 MLJ 160; [1995] 1 CLJ 273, SC (refd)
Dow Jones & Co Inc v Gutnick [2002] HCA 56; [2003] 1 LRC 368, HC (refd)
Low Long Yoong & Anor v Low Kok Choon & Anor [2014] 2 MLJ 725, HC (distd)
Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112, HC (refd)
Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)

Legislation referred to

Companies Act 1965
Courts of Judicature Act 1964 s 23(1), (1)(c), Schedule, para 12
Federal Constitution art 121
Rules of Court 2012 O 57 rr 1, 4, 4(c)

Mureli Navaratnam (Mureli Navaratnam) for the plaintiff.
Kimberley Lee (Raja Darryl & Loh) for the defendant.

Nordin Hassan JC:

INTRODUCTION

[1] This is an application to transfer the proceedings of this Civil Suit No 23NCVC-2–01 of 2014 by the plaintiff against the defendants from the High Court of Malaya at Penang to the High Court of Malaya at Shah Alam pursuant to O 57 r 1 of the Rules of Court 2012 and/or para 12 of the Schedule of the Courts of Judicature Act 1964 .

BACKGROUND FACTS

[2] The plaintiff is the Chief Minister of Penang and Member of Parliament for the constituency of Bagan. The plaintiff is also the State Assemblymen for The Constituency of Air Puteh and Secretary General of Democratic Party ('DAP').

[3] The first defendant is a company incorporated under the Companies Act 1965 ('the company') and owner and operator of www.fz.com ('the website').

[4] The second defendant is the managing editor of the website and author of an article which appeared on the website titled 'MACC begins probe on Merc purchase' on 3 January 2014 ('the article').

[5] The alleged defamatory statements by the defendants in the article, inter alia, are as follows:

(i) 'the Malaysian Anti-corruption Commission (MACC) has started probing the Penang State Government's purchase of a Mercedes-Benz for Chief Minister, Lim Guan Eng.'

(ii) 'It is understood that the Commission is trying to establish a link between the purchase of the Silver Mercedes-Benz S300L from Lowe Motors Sdn. Bhd and tycoon Tan Sri Tan Kok Peng who is believed to have a stake in the Company.'

(iii) 'Sources tell fz.com that the link to Kok Ping is vital due to the numerous complaints and allegations in the public sphere and media over Kok Ping's 'privileged relationship' with the state Government, particularly with Lim, that has benefitted the former as businessman.'

(iv) Kok Ping has rejected accusations that he is DAP's 'Mr. Moneybags' in Penang who has enjoyed many concessions and development approvals, among them parcels of land on Bukit Relau which was cleared by his company General Accomplishments Sdn. Bhd.

(v) 'Widely known as a representative of Berjaya Corp. founder Tan Sri Vincent Tan in Penang, Kok Ping is also said to be the middle man who negotiated the purchase of the Penang Turf Club for Berjaya Land Bhd for a fraction of its value. Berjaya Land only paid under RM500 million for the land that is valued at RM1.5 billion. Vincent and his brother Tan Sri Danny Tan have now acquired interest in development of casinos on Penang Hill.'

(vi) 'The controversial Patrol Squad was also set up from a RM1 million donation from Kok Ping.'

(vii) 'With regards to Mercedes, we want to verify if it was an inducement for contracts and concessions, said a source.'

[6] On 5 January 2014 Malaysian Anti Corruption Commission ('MACC') had published a press statement and denied the fact that MACC had commenced any kind of probe against the plaintiff.

[7] On 20 January 2014, the plaintiff filed a civil suit for defamation against the defendants in Penang High Court.

[8] Thereafter on 7 April 2014, the defendants filed an application to transfer this defamation suit from Penang High Court to High Court at Shah Alam.

THE LAW

[9] To begin with, art 121 of the Federal Constitution states that there shall be two High Courts in Malaysia namely High Court in Malaya and High Court in Sabah and Sarawak. Both High Courts has jurisdiction over dispute that arise within its territory.

Article 121 of the Federal Constitution reads as follows:

There shall be two High Courts of co-ordinance jurisdiction and status, namely:-

(i) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(ii) and in the States of Sabah and Sarawak which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine.

[10] High Court in Malaya have several branchs High Court in the states that have concurrent jurisdiction or having the same authority to try civil cases. Lim Beng Choon J, in the case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 said at p 270:

It is implicit that a High Court located at Penang or at Alor Star is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state.

[11] Apart from this, the High Court civil jurisdiction is governed by s 23(1) of the Court of Judicature Act 1964 ('the CJA') which reads as follows:

Subject to the limitations contained in Article 128 of the Construction the High Court shall have jurisdiction to try all civil proceedings where —

(a) the cause of action arose;

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred;

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the order High Court.

[12] In regard to application to transfer proceedings, O 57 r 1 provides:

(1) Where the Judge of the High Court or Judge of the Sessions Court or a Magistrate is satisfied that any proceedings in that Court can be more conveniently or fairly tried in some other Court of co-ordinate jurisdiction, he may on application by any party, order the proceedings to be transferred to the other Court.

(2) .....

(3) .....

(4) Before making any order to transfer any proceedings from —

(a) the High Court to another High Court of co-ordinate jurisdiction.

(b) a Subordinate Court to the High Court.

(c) the High Court to a Subordinate Court; or

(d) a Subordinate Court to another Subordinate Court.

the High Court Judge or the Judge of the Session Court or Magistrate, as the case may be, shall take into consideration whether the High Court or Subordinate Court which shall hear the case is located at or nearest to the place where —

(A) the cause of action arose;

(B) the defendant, or one of the several defendants, resides or has his place of business;

(C) the facts on which the proceedings are based exist or are alleged to have occurred;

(D) the land the ownership of which is disputed is situated; or

(E) for other reasons it is desirable in the interests of justice that the proceedings should be transferred.

THE DEFENDANT'S SUBMISSION

[13] Learned counsel for the defendant submitted that based on the doctrine of 'forum non conveniens', Shah Alam High Court is more suitable and appropriate forum to determine the case in dispute. It was contended that Shah Alam is the place where this matter has the most real and substantial connection. The case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* [1995] 1 MLJ 160; [1995] 1 CLJ 273 was cited to support her contention.

[14] The counsel further argued that Shah Alam has the closest nexus to the dispute and High Court Shah Alam is the appropriate and suitable forum on the following grounds:

(a) the first defendant's registered address and place of business is in Petaling Jaya;

(b) the website was operated by first defendant and the article was uploaded onto the website from the first defendant's place of business in Petaling Jaya;

(c) the second defendant resides in Cyberjaya; and

(d) the events pertaining to this action relate to the preliminary probe commenced by the MACC into the purchase of the Mercedez Benz for the plaintiff's use and into the alleged links between the plaintiff and Tan Sri Tan Kok Ming.

The MACC's headquarters and officers are based in Putrajaya. The defendant's are intending to call witnesses from the MACC to testify at the trial.

THE PLAINTIFF'S SUBMISSION

[15] On the other hand, the counsel for the plaintiff submitted that the cause of action arose in Penang. He submitted that the place in tort in defamation is at the place where the damage to reputation occurs. He further contended that the damage to the plaintiff's reputation occurred whenever there is an internet user downloaded the article from the internet. As such, it was argued that the damage to the plaintiff's reputation is far more greater in Penang because of his

position as the Chief Minister and Member of Parliament of Bagan Constituency and State Assembly for Air Puteh.

[16] It was also submitted that the material facts relating to the case exist in Penang.

FINDINGS OF THE COURT

[17] The position of the law with regards to transfer of proceedings is well settled, O 57 r 1 clearly states that before a decision to transfer any proceedings is made, the court shall take into consideration factors as provided under O r 1(4) which, inter alia:

(a) the place where the cause of action arose;

(b) the place on which the proceedings are based exist or alleged to have occurred; and

(c) other reasons, if it is desirable in the interest of justice.

[18] In the present case, I agree with counsel for the plaintiff that in action for defamation, the place where cause of action arose is the place where the damage to reputation occurs. The damage to the plaintiff's reputation occurred when any person downloads and reads the article.

[19] In an Australian case *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; [2003] 1 LRC 368 the court had this to say:

> In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, *defamation is to be located at the place where the damage to reputation occurs*. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. *In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed*. (Emphasis added.)

[20] However, as we are all aware, internet service is borderless and the article can be downloaded from any part of the world with internet access including Penang and Shah Alam. Therefore, the place where the cause of action arose could be any place that has internet access. It could be Penang, Shah Alam or some other places.

[21] As such, this issue has to be examined further especially in relation to the plaintiff's reputation. As pointed out by the plaintiff's counsel, the damage to the plaintiff's reputation is far more greater in Penang because of the plaintiff's position as Chief Minister of Penang, Member of Parliament of Bagan Constituency and State Assembly Representation for Air Puteh. This contention by counsel has basis for this court to determine the forum to hear and dispose this case.

[22] Another factor that this court take into consideration is as provided under O 15 r 1(4)(c) which is, the facts on which the proceedings are based exist or occurred.

[23] Having analysed the contents of the article and the alleged defamatory statements, it shows that all the facts stated therein occurred in Penang or related to matters in Penang. The contents of the alleged defamatory statements are the material facts in dispute to be examined by the court and certainly not confined only on the issue of whether or not MACC had commenced a probe into the purchase of the Mercedez Benz as contended by counsel for the defendants.

[24] In this connection too, it is settled law that legal burden of proof rest on the plaintiff and in tort of defamation, the plaintiff in present case has to prove:

(a) the statement bears defamatory imputations;

(b) the statement must refer to or reflect upon the plaintiff's reputation; and

(c) the statement had been downloaded and read by third party.

[25] In this regard, as the facts in the alleged defamatory statements contained matters related to Penang, witnesses from Penang including Tan Sri Tan Geok Ping to be called as witnesses cannot be ruled out. The calling of these witnesses which are from Penang is pertinent, inter alia, to show the falsity of the alleged defamatory statements.

[26] On the issue of jurisdiction in civil proceedings, a branch High Court in Malaya has jurisdiction to hear a case if the case falls under any one of the sub-paragraph under s 23(1) of the CJA.

[27] Augustine Paul J (as he then was) in *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 viewed:

> What I have said thus far would arise for consideration in this case only if, in the first place, the plaintiff's case has been filed in the wrong branch of the High Court contrary to the provisions of s 23(1) of the CJA. The principal contention of the defendant is that this action should be tried in the High Court in Malaya at Kuala

Lumpur in accordance with s 23 (1) of the CJA as he resides there. It thus becomes necessary to consider the legal effect of the section. It has four sub-paragraph. The contents appearing at the end of sub-para (a), (b), (c) and (d) in the section followed by the word 'of means that they must be construed disjunctively. Thus a party instituting a proceeding to particular branch of the High Court may do so if his case falls within any one of the sub-paragraph'.

[28] In the present case, as the facts on which the proceedings are based exist or occurred mainly in Penang, by virtue of s 23(1)(c) of the CJA, Penang High Court has the jurisdiction to hear this case.

[29] In regard to the doctrine of 'forum non conviniens', Peh Swee Chin SCJ (as he then was), in the case of *American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor* SCJ (as he then was) succinctly explained at pp 280–281 as follows:

The doctrine of forum non conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Consulax Ltd (The Spilida)* [1986] 3 All ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by *R H Hickling and Assoc Prof Wu Min Aun* [1994] 3 MLJ xcvii.

The main judgment in Spiliada was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Si v Robinow* [1892] 19 R (ct of Sess) 665668 as being the fundamental principle in regard to this doctrine ie, that there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitable for the interest of all parties and for the ends of justice. *Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.* (Emphasis added.)

[30] The learned judge goes on to say:

The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine, *the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection*. (Emphasis added.)

[31] Based on authority cited, Penang High Court is the suitable and appropriate forum to hear this case as it is the forum which the action has most real and substantial connection.

[32] The case of *Low Long Yoong & Anor v Low Kok Choon & Anor* [2014] 2 MLJ 725 cited by the defendant to support the defendants application can be distinguished. In that case the learned judicial commission transferred the case to High Court Muar because apart from the second defendant resides in Kluang, the land which is the subject matter of the 2004 suit is situated in

Kluang and the 1998 suit which connected to the 2014 suit had been transferred from Penang High Court to Muar High Court.

[33] In the present case, the fact that the first defendant is situated in Petaling Jaya and the second defendant resides in Cyberjaya are not sufficient ground to transfer this case to Shah Alam High Court. There are other factors, as mentioned earlier that were considered by this court which then of the view that the proper forum for this case is Penang High Court.

[34] In *Malacca Securities Sdn Bhd* the defendant's application to transfer the case to High Court Kuala Lumpur was rejected although the defendant resides in Kuala Lumpur. This is what the learned judge in that case at p 127 said:

> The plaintiff's case also comes within sub-para (c) as the facts on which the action is based occurred in Melaka. I please to add that the defendant's denial of liability is a matter for resolution at the trial and does not alter the conclusion that I have drawn. *As the plaintiff has brought itself within s 23(1)(a) and (c) of the CJA it is entitled to file this action in Melaka notwithstanding the fact that the defendant resides in Kuala Lumpur.* The defendant's application is therefore without any merit.

CONCLUSION

[35] Based on the above reasons, the defendants application in encl 7 to transfer this case to Shah Alam High Court is dismissed with costs of RM3,000 to be paid to the plaintiff by the defendants.

Defendant's application dismissed with costs of RM3,000.

Reported by Ashok Kumar